INTERSTATE CRIME AND INTERSTATE EXTRADITION.[1]

THE commission of crimes across State boundary lines has given serious trouble, and justice has been cheated, where the State from which the criminal agency emanated has been upon a simple common-law basis. One of the most famous cases is that of State *v.* Hall, in the Supreme Court of North Carolina. It appeared that the defendants, being in North Carolina, fired a shot which caused the death of a person who was across the boundary line in Tennessee. The defendants were tried for murder in North Carolina, but the Supreme Court of that State held[2] that the courts of Tennessee alone had jurisdiction, because the prisoners "were deemed by the law to have accompanied the deadly missile sent by them across the boundary and to have been constructively present when the fatal wound was actually inflicted."

In the opinion a large number of authorities from the different States of the Union are collated, all substantially agreeing that the locus of a crime is the place where the criminal act takes effect. It is remarked in the opinion: —

"It is true that in Wharton's Criminal Law (§ 288) it is said in a general way that 'a concurrent jurisdiction exists in the place of starting the offence;' but by a reference to the cases cited in support of the proposition it will be readily seen that they have no application to the question under consideration. These and like authorities are where libels are uttered in one State to take effect in another (U. S. *v.* Worrall, 2 Dal. 388); or where, either by common law or by statute, the place of the stroke has concurrent jurisdiction (Green *v.* State, 66 Ala. 40); or where an accessory before the fact in one State to the felony committed in another was held to be indictable in the State where he became accessory (State *v.* Chapin, 17 Ark. 560); or in certain cases of false pretences or in conspiracies where an overt act is committed at the place of the trial; or where, by statute, a particular 'section' of an offence committed in one jurisdiction is there made indictable, as for instance,

[1] An address delivered by Mr. Larremore before the New York State Bar Association on January 17, 1899. — ED.

[2] 114 N. C. 909.

the act of shooting or unlawfully using a deadly weapon within the State, as in the preseant case. In some instances they may be concurrent jurisdiction of the whole offence, and in others there may exist the jurisdiction of an attempt in one State and of the consummated offence in another."

It seems quite clear that statutes should be generally adopted giving concurrent jurisdiction of offences as a whole both in the State in which the criminal act is set in motion and the State in which the crime is consummated. Such a statute exists in the State of California, and one substantially similar in terms is also a part of the law of New York. The California Penal Code provides that "all persons who commit, in whole or in part, any crime within that State are liable to punishment within its laws." Under the authority of this law, the trial of Mrs. Botkin has just been concluded, and she has been convicted of murder upon the theory that she deposited poisoned candy in the mail within the State of California directed to a person in the State of Delaware, where it was received by the latter, who died from eating it. There was some discussion on the trial, and the question will doubtless be argued elaborately on appeal, whether the cause of the Penal Code sufficiently covered the case. The statute might have been more specifically phrased, but it is difficult to understand just what its language referred to if not to such a case as that of Mrs. Botkin, and certainly the signification given to it was in the interests of justice. The provision of the New York Penal Code (section 16) is that a person is punishable criminally "who commits within the State any crime, in whole or in part." It is probable that, in New York as well as in California, the provision in question would be held to apply to a person setting a crime in motion within a State, to take effect outside, but if such statutes are inadequate in form they should be amended to meet the necessity.

A criticism that may be made upon such proposed policy is that it might result in a person being tried twice for the same offence. The force of this suggestion lies in the fact that the constitutions of a few of the States do not contain a second jeopardy clause. Nevertheless it still would seem to be a less evil to recognize jurisdiction of the crime in both the States than to let the criminal go scot-free, as seems to have been the ultimate result in State *v.* Hall (*supra*). Even though one of two States concerned did not have a second jeopardy provision, there is slight probability that

a second prosecution would be instituted and pushed with energy after an acquittal on the merits upon a fair trial in the State first acquiring physical possession of the prisoner and full jurisdiction of the offence.

The inquiry naturally suggests itself, why not extradite the culprit from the State in which he set his crime in motion to the State in which it accomplished its result. In the North Carolina-Tennessee case, above referred to, such an attempt was made and the right to such interstate rendition was denied.[1] I think this was proper, even though the circumstances were very flagrant and the miscarriage of justice very gross. The discussion of the grounds for such refusal renders desirable some little general consideration of the subject of interstate extradition or rendition. The right is conferred by the second section of Article IV. of the Constitution of the United States, which provides that "a person charged in any State with treason, felony or other crime, who shall flee from justice and be found in another State, shall, on the demand of the executive authority of the State, from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." This language is merely declaratory of a general principle, and in order, in part at least, to furnish *modus operandi*, Congress as early as 1793 passed a statute, the salient portions of which have been re-enacted in sections 5278 and 5279 of the Federal Revised Statutes, and read in part as follows: —

"Whenever the Executive authority of any State or Territory demands any person as a fugitive from justice of the Executive authority of any State or Territory to which such person has fled, and shall produce a copy of an indictment found or an affidavit made before a magistrate or any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the Governor or Chief Magistrate of the State or Territory from whence the person so charged has fled, it shall be the duty of the Executive authority of the State or Territory to which such person has fled to cause him to be arrested and secured, and cause notice of the arrest to be given to the Executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appear within six months from the time of the arrest, the prisoner may be discharged.

[1] State *v.* Hall, 115 N. C. 811.

"Any agent so appointed who shall receive the fugitive into his custody shall be empowered to transport him to the State or Territory from which he has fled."

During the agitated period preceding the Rebellion, when the Slavery controversy was acute, conflicts arose between the governors of demanding States and the governors of States of refuge of fugitives, as to whether an act should be recognized as a ground of rendition which constituted a crime in the State in which it was performed, and from which its performer had fled, but did not constitute a crime in the State in which he had taken asylum. This was entirely natural, considering not only the intense feeling and political partisanship generated by any case touching slave property, but also that the conception of independent sovereignty of the several States quite generally prevailed. The most famous of such gubernatorial collisions was between Governor Seward of New York and Governor Gilmer of Virginia. The controversy illustrated Seward's aggressiveness of temperament because his contention was really *obiter*. An agent from Virginia appeared at Albany with a requisition for two negroes charged with stealing a slave. They were at the time in custody in New York. Seward deferred his formal answers to the requisition until his return from a short absence from the capital. Thereafter the prisoners were discharged on habeas corpus on the ground that "neither of them had committed an offence against the laws of Virginia." However, Seward in a letter to the Governor of Virginia "embarked in a discussion of the proper construction of the constitutional provision for the surrender of fugitives from justice, insisting that it applied only to offences recognized as crimes by the jurisprudence of all civilized nations, or to acts made criminal by the laws both of the State demanding and of that assenting to the surrender, and did not apply to acts which any one State chose to make highly penal, but which had no criminal significance in another, such as assisting in the escape of a slave, — an act inspired by the spirit of humanity and of the Christian religion."[1] Seward's argument is to be classed with many other strained constitutional constructions under the exigency of the "Irrepressible conflict." Happily the flagrant solecism of slavery in a nominally free government no longer exists to excuse or even demand causistical interpretation. The words

[1] Life of Seward, American Statesmen Series, by T. K. Lathrop, page 40.

of the Constitution are that a person "*charged in any State*" with crime, "shall on demand of the executive authority of the State from which he fled be delivered up," &c. The true construction of this provision is felicitously put in the opinion of Judge Andrews in People ex rel. Lawrence *v.* Brady: [1] —

"The word crime in the clause of the Constitution which has been quoted, embraces every act forbidden and made punishable by the laws of a State, and the right of a State to demand the surrender of fugitives from justice extends to all cases of the violation of its criminal law. Com. of Kentucky *v.* Denison, 24 How. (U. S.) 104. Felonies and misdemeanor offences by statute and at common law are alike within the Constitutional provision; and the obligation to surrender the fugitive foe an act which is made criminal by the law of the demanding State, but which is not criminal in the State upon which the demand is made, is the same as if the alleged act was a crime by the law of both."

Another interpretation of the constitutional power of a demanding State has materially confirmed the efficacy of interstate rendition as a remedy. Up to the year 1893 a spirited judicial controversy existed on the question whether a fugitive surrendered for a certain offence could be tried in the demanding State for a different offence. The courts of different States were arrayed in favor of and against such right. The mooted point was finally authoritatively settled by the decision of the Supreme Court of the United States in Lascelles *v.* Georgia.[2] It was held that a fugitive from justice, who has been surrendered by one State to another State upon requisition charging him with the commission of a specific crime, has, under the Constitution and laws of the United States, no immunity or exemption from indictment and trial in the State to which he is returned for any other or different offence from that designated in the requisition, without first having an opportunity to return to the State from which he was extradited. The decision of the Supreme Court was unanimous, and unquestionably it embodied the sound view. The argument against the right to try for a different offence was founded upon a supposed analogy between international extradition and interstate rendition. The court by justice Jackson, remarked:

"To apply the rule of international or foreign extradition, as announced in United States *v.* Rauscher, 119 U. S. 407, to interstate rendition, involves the confusion of two essentially different things, which

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1 56 N. Y. 182.

2 148 U. S. 537.

rest upon entirely different principles. In the former the extradition depends upon treaty contract or stipulation, which rests upon good faith, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded, there being no rule of comity under and by virtue of which independent nations are required or expected to withhold from fugitives within their jurisdiction the right of asylum. In the matter of interstate rendition, however, there is the binding force and obligation, not of contract, but of the supreme law of the land, which imposes no conditions or limitations upon the jurisdiction and authority of the State to which the fugitive is returned."

It thus appears that the policy of interstate rendition as now settled contemplates that the States are not in any substantial sense independent sovereignties. The law of the demanding State alone determines whether a crime has been committed, and, once returned there, the prisoner may be tried for any other crime. Any person who has left a State after an offence against its laws may be surrendered, and the only immunity vouchsafed to the citizen against summary transportation to a distant forum is that he may require it to be shown that he had actually been within the demanding State and left it.

This latter point seems to be settled in the citizen's favor. The language of the Constitution and statute indicates that actual fugitives alone and not constructive fugitives were contemplated. Furthermore there has been an authoritative interpretation to such effect. In Ex Parte Reggel[1] it was said: "The appellant was entitled, under the act of Congress, to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction, so that he could not be reached by her criminal process. The statute, it is to be observed, does not prescribe the character of such proof; but that the executive authority of the territory was not required by the Act of Congress to cause the arrest of appellant, and his delivery to the agent appointed by the governor of Pennsylvania, without proof of the fact that he was a fugitive from justice, is, in our judgment, clear from the language of that Act." I am inclined to concur in the opinion advanced by Mr. John Bassett Moore in his comprehensive and valuable work on extradition (section 590), which the learned

[1] 114 U. S. 642.

author fortifies by language of the Supreme Court in a later case,[1] that the language above quoted from Ex Parte Reggel does not necessarily call for the exaction of specific proof of flight before the governor of the State in which the prisoner is may constitutionally take any action. But certainly under the language of Ex Parte Reggel an alleged fugitive is entitled to have the question, whether he had been corporeally within the demanding State and left it, passed upon before he may be lawfully surrendered. There may be prima facie ground for action without specific allegations in the requisition papers that the person called for has fled from the demanding State, and even for final action if the question of flight is not put in issue. But, if the person apprehended does deny that he was corporeally within the demanding State at the time of the commission of the alleged offence, he has a constitutional right to have such issue passed upon by the governor in the first instance, and by the courts on habeas corpus, and is constitutionally entitled to be discharged unless it appear at least presumptively that he is an actual fugitive.

This rule that only an actual fugitive is extraditable is one to be broadly accepted and administered in practice according to its fullest and most radical scope. Any other rule would lead to grave injustice and grievous oppression. Take, for instance, the recent Botkin case, in which a conviction was secured in California. The theory of the prosecution was that Mrs. Botkin, the defendant, deposited poisoned candy in the mail in California directed to her victim in Delaware. Under the statute law of California the offence was triable there, and it accorded with common sense and convenience and was eminently just both to prosecution and defence that the trial should be had not at the technical locus of the crime, but at the place where the defendant was alleged to have performed the act that set the crime in motion. Suppose, on the other hand, that Mrs. Botkin had been under the law extraditable and had been transported to Delaware to answer the indictment. She would have been compelled, among strangers, it may be without means to adequately present her defence, to stand trial for a capital crime. If she wished to present evidence besides her own it might have been impracticable to procure the personal presence of important witnesses, and, herself a foreigner under suspicion, she might have been subjected to the prejudices of a local jury,

[1] Roberts *v.* Reilly, 116 U. S. 80.

necessarily sharing the popular indignation over the murder of a locally well known citizen. The following language from the opinion in Ex Parte Smith,[1] though uttered apropos of the duty of care in sifting evidence, will not be amiss in the present connection: —

"No case can arise demanding a more searching inquiry into the evidence than cases arising under this part of the Constitution of the United States. It is proposed to deprive a free man of his liberty, to deliver him into the custody of strangers, to be transported to a foreign State, to be arraigned for trial before a foreign tribunal, governed by laws unknown to him, separated from his friends, his family, and his witnesses, unknown and unknowing. Had he an immaculate character it would not avail him with strangers. Such a spectacle is appalling enough to challenge the strictest analysis."

A few years ago it was reported in the newspapers that a governor of the State of Texas proposed to demand the rendition of a citizen of New York, who had not been in Texas, for trial for the offence of violating the Texas anti-trust law, the gravamen of his offence consisting of acting as an officer of the Standard Oil Trust, whose principal office and base of operations are at the City of New York. It was said that the demand would not be made upon the State of New York — under repeated precedents there it would have been summarily refused — but upon another Southern State, in which the gentleman in question was in the habit of temporarily sojourning, and whose governor was reported to hold views of the law of extradition similar to those of the extraordinary executive of Texas. If this preposterous scheme actually was entertained it was snuffed out by widespread discussion. If its accomplishment had been attempted and the requisition had been honored by the governor upon whom it was made, doubtless the gentleman, who by constructive presence was alleged to have violated Texas law, would have been promptly discharged upon habeas corpus. When we consider the enormous possibilities of half-baked legislation in mining-camps prematurely erected into States, as well as the demagogic legislation adopted in many States old enough to know better, it becomes very obvious that if constructive presence were regarded as sufficient to authorize extradition, persons of conspicuous financial standing would be liable to very serious oppression on frivolous pretexts.

[1] 3 McLean, 121.

It has been remarked that the rule that only actual fugitives are extraditable should be respected and administered in its widest and most literal scope. Usually courts and judges have fully carried out this policy, but exceptions occasionally occur. In the North Carolina-Tennessee case above referred to, the Supreme Court of North Carolina is entitled to great respect for firmly administering the law although the result was practically most outrageous. Duty constrained the court to decide first that persons firing a shot in North Carolina, which took effect across the boundary line in Tennessee, could not be prosecuted in North Carolina because the technical locus was where the act took effect, and a duty just as clear afterwards compelled them to refuse extradition of the malefactors to Tennessee because they had not been within that State. From this latter decision two members of the Supreme Court of North Carolina dissented, their argument being that the theory of constructive presence of the murderers in Tennessee when the shot was fired from North Carolina must be consistently carried out, so that if they were constructively in Tennessee and had since actually been found in North Carolina they must have constructively fled from Tennessee and therefore be extraditable. This reasoning is fallacious because the extradition application was under Federal law, proceeding on general principles and independently of the State laws.

These dissents illustrate the judicial spirit sometimes cropping out to insure the doing of justice in an exceptional case, law or no law. Occasionally in interstate rendition cases judges whose judicial ideals are beyond reproach fall short of effectuating the constitutional rights of the citizen through following State law. It must be constantly kept in mind that interstate rendition rests on Federal law, and that such rights as the citizen possesses are secured to him by the Federal Constitution. The Federal statutory provisions, however, are very meagre, and there has naturally grown up a large volume of State jurisprudence both statutory and case. At a meeting of delegates to an interstate extradition conference, appointed by the governors of several States, held in New York City in 1887, a proposed statute was formulated and recommended to be adopted by Congress. Such act is comprehensive in its terms, prescribing practice and procedure as well as matters of substantive law; it apparently embodies the result of careful study and sound judgment, and might well be passed in order to secure uniformity throughout the Union. But,

until such a provision be made, State law from very necessity will continue to cut an important figure. It is well settled that the courts, State as well as Federal, have jurisdiction on Habeas Corpus to review the action of the governor surrendering a person for extradition to the agent of a demanding State. And in so doing State courts should administer Federal law primarily, administering State law only in so far as it aids in the effectuation of the spirit of the Federal law. An interesting case was passed upon at a Special Term of the Supreme Court in New York City in 1895, in which one of the ablest and most conscientious of the New York judges was in my judgment led into heterodoxy through the assumption that his power was limited by the narrow terms of a State statute.[1] Section 827 of the New York Code of Civil Procedure attempts to regulate the procedure upon Habeas Corpus in interstate extradition proceedings, and, as the learned judge points out, "according to the letter of the statute, at least, the only question which the court can determine is the question of the identity of the prisoner with the person against whom the charge has been made, or with the person named in the warrant of the governor." Accordingly, identity being clear, the writ was dismissed as to two persons, and their extradition to Massachusetts ratified, although it was made to appear presumptively that they had not been within that State at the time of the commission of the crime. Certain coupon bonds had been stolen in Massachusetts, and, although the relators who resided in New York City were shortly thereafter in possession of a part of the property, they claimed they had received it there from a woman called "Maggie" and undertook to dispose of it on her account. Very probably the relators had guilty knowledge, but the facts recited in the opinion make it even more probable that they had not been in Massachusetts. However this may be, the court declined to pass upon that question as immaterial. The following is from the opinion: —

"It would also seem that it must appear upon the papers that the prisoner is a fugitive from justice, in the sense that he was either present in the State at the time of the commission of the offence charged, or that the crime alleged is of such a character as necessarily to imply the presence of the prisoner within the State at the time it was committed. This excludes a certain class of crimes which may be committed by persons

[1] People ex rel. Ryan *v.* Conlin, 15 Misc. 303.

who are not at the time within the State whose laws have been infringed. To be a fugitive from justice, and therefore, subject to extradition, it must appear by proof or necessary inference that the prisoner was within the State at the time of the commission of the crime with which he is charged. If the papers upon which the governor's warrant is issued tend to show that the case is one coming within this definition, I do not think that the court has any power to try the question on habeas corpus whether the prisoners were, or were not, at the time the offence was committed, within the demanding State.

In the case at bar a large amount of proof has been taken tending strongly to show that the relators were not in the State of Massachusetts, but in this State, at the time when the bonds in question were stolen. But all of this is really matter of defence to the charge. Upon the trial of the charge in the State of Massachusetts, the commonwealth must make out its case by proving the commission of the theft in question by the relators; and the ground upon which they now seek to be discharged in this State is really the defence of an alibi, which should properly be made and proven upon such trial. It never could have been intended by the legislature, nor is it, I think, a matter of constitutional right with the relators, that such a question as this should be tried and determined in such proceedings as these. It has been repeatedly held that the court has no right upon a question of extradition to consider the charge upon its merits, or to undertake, in any way whatsoever, to determine whether it is well founded or not."

With the utmost respect, we think the position thus taken radically unsound. Non-presence would of course constitute the defence of an alibi to a prosecution in the Massachusetts courts, but, entirely distinct from this, under Federal and not State, law, in the language of Ex Parte Reggel (*supra*), each relator was "entitled according to the Act of Congress to insist upon proof that he was within the demanding State at the time he is alleged to have committed the crime charged, and subsequently withdrew from her jurisdiction." The correct view of this phase of the subject is well presented in a convenient little book on Interstate Extradition by John G. Hawley, Esq., of Detroit. The author says: —

"It is only in the courts of the State from which he is sought to be extradited that the accused can ever be heard upon this question (whether he is a fugitive). For, as we shall see hereafter, he cannot raise the question of the regularity or legality of his extradition in the State to which he is taken, upon his trial. To say, therefore, that he cannot be heard upon this question before he is removed, is to say that a

man can be deprived of a valuable right without any opportunity of being heard. But it is only in a plain case that a judge would be justified in discharging an alleged fugitive upon this ground. If there is a conflict of evidence, yet if there is sufficient evidence to justify the Governor or the court in believing that the prisoner is a fugitive from justice, he should be extradited. (Re Kellar, 36 Fed. Rep. 681; Roberts *v.* Reilly, 116 U. S. 80)

"But if on the other hand it is made to appear clearly that the accused is not a fugitive within the meaning of the Constitution, he should be discharged. And upon this question of fact he is entitled to a full hearing." (Jones *v.* Leonard, 50 Iowa, 106; Re Smith, 3 McLean, 121; Tenn. *v.* Jackson, 36 Fed. Rep. 258; Hartman *v.* Aveline, 65 Ind. 344; Wilcox *v.* Wolze, 34 Ohio St., 520; Re Mohr, 73 Ala. 503.)

If judges of State courts, either because feeling constrained by the peculiar form of State statutes, or, for other reasons, do not effectuate the rights of an arrested person, under the Constitution and statutes of the United States, the proper remedy would seem to be to apply to a Federal judge for another writ of habeas corpus. The technical rule appears to be established that "a decision upon one writ refusing a discharge does not prevent the suing out of another writ from another court or officer."[1] In Mr. Moore's work on extradition (section 647) there is cited the instance of an arrested person, who, having been held for extradition by a State court, thereafter applied for a writ of habeas corpus to a United States court. The Federal judge arrived at the same conclusion as the State judge, holding the relator liable to extradition. The case is significant, however, as illustrating that Federal judges will entertain writs of habeas corpus for the discharge of prisoners although similar writs have already been discharged by State courts.

The rule is well settled that the Federal courts ordinarily will not interfere by habeas corpus to inquire into the restraint of liberty of a person under authority of a State, because alleged to be in contravention of the Constitution, laws, or treaties of the United States. The policy of the Federal courts in such cases is to permit a prosecution in the State courts to proceed to judgment, the prisoner being relegated to his right of raising any question of infringement of Federal privileges and immunities upon writ of error from the Supreme Court of the

[1] Ex parte Kaine, 3 Blatchf. C. C. 1; Roberts *v.* Reilly, 116 U. S. 80; Re Mohr, 73 Ala. 503; Re Perkins, 2 Cal. 474; Re Ring, 28 Cal. 247.

United States to review the determination of the Supreme Court of a State affirming his conviction.[1] Any other general policy would be out of the question, because prosecutions in State courts would be constantly embarrassed and delayed by Federal interference. At the same time the Federal courts have never renounced the right to issue writs of habeas corpus in exceptional cases, where immediate intervention may be essential for the upholding of whatever rights a relator may have under the Federal Constitution and laws.[2] It would therefore seem that there can be no question — even considering their general policy of non-interference — that Federal courts would be authorized to interpose and prevent the extradition of a person to a distant forum, if he has not been within the territorial jurisdiction of such forum. Furthermore, the ordinary rules regulating possible conflicts between Federal and State courts in criminal matters do not apply in the present connection, because interstate extradition is purely the creation of Federal law. There is not, therefore, a conflict between Federal and State law in the ordinary sense. In the question of extradition the only point involved is whether Federal law has been properly administered. Therefore a Federal court should have even less hesitation in nullifying the action of a State court upon a second writ in an extradition proceeding, than if the case were one where the criminal law of the State were expressly involved.

Wilbur Larremore.

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[1] For two recent illustrations see Baker, Sheriff *v.* Grice, 18 Sup. Ct. Rep. 323; Tinslay *v.* Anderson, Sheriff, 18 Sup. Ct. Rep. 805.

[2] See authorities last cited.